EXHIBIT B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

THE BANK OF NEW YORK MELLON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NUMBER:
	)	CV200902318
JEFFERSON COUNTY, et al.,	)	
	)	
Defendants.	)	
	)	

OPPOSITION TO THE BANK OF NEW YORK'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT BY DEFENDANTS

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The Court should deny the Trustee's Motion for Partial Summary Judgment because the Trustee, the Bank of New York Mellon (the "Bank of New York"), did not comply with a fundamental prerequisite to bringing suit against the County: it did not present its breach of contract claim to the Jefferson County Commission within one year of its accrual. As a matter of law, that failure precludes the relief the Bank of New York seeks

The Bank of New York has made clear in its Motion for Partial Summary Judgment that it is pursuing a breach of contract claim. It asks the Court to rule as a matter of law that breaches of contract have occurred. The Bank of New York has repeatedly characterized this case as a breach of contract case, and its goal in this case is to obtain a contractual remedy – namely, the installation of a court-appointed, rate-making receiver. Importantly, the Bank of New York is ***not*** asking the Court to order payment on the County's sewer warrants; this is ***not*** a case of warrantholders' presenting warrants for payment. Therefore, the Bank of New York's breach of contract claim is not excused from the requirements of Ala. Code § 6-5-20.

Unfortunately for the Bank of New York, Alabama law requires a party to present its claims to the Jefferson County Commission before it can sue for breach of contract, and requires it to do so within one year of the claim's accrual. The Bank of New York failed to satisfy this fundamental (and relatively simple) requirement. Therefore, its breach of contract claim is legally barred. The Motion for Partial Summary Judgment should be denied, and judgment as a matter of law should be entered for the County.

The Defendants' Cross Motion for Partial Summary Judgment is based on: 1) the following Narrative Summary of Undisputed Facts, 2) the pleadings, exhibits to pleadings, and discovery responses in this case, 3) the Defendants' Evidentiary Appendix in Support of Cross Motion for Partial Summary Judgment, which is being filed with this motion.

NARRATIVE SUMMARY OF UNDISPUTED FACTS

1. This is a suit to enforce the contract between the Bank of New York Mellon and Jefferson County. *See* Complaint, ¶¶ 6, 12, 31, 49-80; Trustee's Objection to Motion to Intervene and Memorandum of Law ("BNY's Opp. to Intervention"), filed on March 8, 2010, at 3, 8, 12.

2. The contract at issue is the Indenture governing Jefferson County's sewer warrants. *See* Ex. B to Complaint.

3. The Trustee is seeking to enforce the rights and remedies provided to it in the Indenture. *See* Defendants' Evidentiary Appendix in Support of Cross Motion for Partial Summary Judgment ("Def. Evid. App."), Ex. A (Bank of New York Mellon's Answers to Jefferson County's First Interrogatories) ("BNY Interr. Ans."), Nos. 8, 10, 13.

4. The Trustee has represented to the Court that the core questions raised in this proceeding are whether Jefferson County has defaulted under the Indenture and whether the Trustee is entitled to the appointment of a receiver. *See* BNY's Opp. to Intervention, at 5.

5. No warrantholder has instructed the Trustee to file this lawsuit or to seek the relief the Bank of New York is pursuing in this lawsuit. *See* Def. Evid. App., BNY Interr. Ans., No. 3.

6. The first alleged breach of the Indenture occurred no later than June 2, 2008.[1] *See* Def. Evid. App., Ex. B (Bank of New York's Responses to County's First Requests for Admissions) ("BNY Req. Admit Ans."), at No. 3. On that date, the County missed a payment of principal and interest on the warrants. *See* Complaint at ¶¶49-50; Answer at ¶¶ 49-50.

[1] The Bank of New York has previously taken the position that "An Event of Default existed under the Indenture with respect to the Rate Covenant in section 12.5(a) of the Indenture prior to June 1, 2008, and may have existed with respect to the County's failure to make principal redemption payments as early as April 1, 2008." *See* Joint Evidentiary Stipulation, Ex. A, at 25, No. 207 (Plaintiff's position). For purposes of the Defendants' argument in this Cross Motion for Partial Summary Judgment, it does not matter whether the first alleged Event of Default existed before June of 2008, or on June 2, 2008.

7. The Indenture contains an acceleration clause stating that if the County misses a payment, the Trustee has the right to accelerate the entire debt. *See* Indenture at § 13.2(a) (Ex. B to Complaint, at 79).

8. The Bank of New York filed the complaint in this case on August 3, 2009. *See* Complaint.

9. The Bank of New York has moved for partial summary judgment that the County is in default of its obligations under the Indenture. The motion for partial summary judgment does not seek a judgment for payment on the warrants. The motion for partial summary judgment does not seek a judgment on any of its other claims or requests for relief. *See* Trustee's Motion for Partial Summary Judgment at 1.

10. The Bank of New York presented its breach of contract claim on July 24, 2009. *See* Complaint, ¶ 119; Def. Evid. App., Ex. C (Affidavit of Diane Townes) ("Townes Aff."), at ¶ 8. This presentment was itemized and verified, under oath, by Bank of New York representative Bridget M. Schessler. *See* Def. Evid. App., Townes Aff. at ¶ 10 & Exh. 2.

11. This was the first and only presented claim that the County has ever received from the Bank of New York. *See* Def. Evid. App., Townes Aff. at ¶ 9.

12. None of the letters from Bridget M. Schessler to the Jefferson County Commission, attention President Bettye Fine Collins – dated October 15, 2008; November 14, 2008; December 19, 2008; February 17, 2009; and March 24, 2009 – was verified under oath. *See* Joint Evidentiary Stipulation, Exhibits 30-33 submitted in Federal litigation; Ex. H to Complaint.

13. The complaint and amended complaints filed by the Bank of New York Mellon in the United States District Court for the Northern District of Alabama, styled *Bank of New York*

Mellon et al. v. Jefferson County, Alabama et al., Case No. 2:08-CV-01703-RDP, were not verified under oath. *See* Def. Evid. App., Ex. D.

14. The County raised the failure to comply with the presentment requirement in its very first responses to the federal court complaint and motion for the appointment of a receiver, in the parties' factual stipulations in federal court, its subsequent motions to dismiss the federal court complaint, its motion to dismiss the complaint in this case, and its answer in this case. *See* Def. Evid. App., Ex. E (Answer in the Federal litigation), at 14; Def. Evid. App., Ex. F (Defendants' Response in Opposition to Plaintiffs' Emergency Motion for the Appointment of a Receiver in the Federal litigation), at 14-16; Joint Factual Stipulation, Ex. B at 12, No. 96; Def. Evid. App., Ex. G (Defendants' Motion to Dismiss Plaintiffs' Supplemental Complaint from the Federal Action) at 7-8; Defendants' Brief in Support of Motion to Dismiss at 5-15; and Answer at 30.

15. Throughout the federal court litigation, the Bank of New York Mellon argued that it was not required to present its claims.

16. On June 16, 2009, United States District Court Judge R. David Proctor abstained from ruling on the presentment issue because presentment is "a fundamental prerequisite to the entire lawsuit" and "the Alabama state courts should be given the opportunity to address this issue." (*See* Complaint, Ex. A, at 50-52).

ARGUMENT

The Bank of New York argues that it is entitled to partial summary judgment on the issue of whether Events of Default have occurred under the Indenture. On the one hand, the Bank of New York's motion may be an exercise in the obvious. For example, the County admits that its net sewer revenues are currently insufficient to pay the accelerated principal and interest on the

warrants as these payments come due. Indeed, some of the facts recited by the Bank of New York are not – and could not be – in dispute because the County has stipulated to them.

Even a complete absence of factual dispute gets the Bank of New York only part of the way to its requested partial summary judgment, however. It must also establish that it is entitled to judgment as a matter of law. This it cannot do because the legal consequences of the facts the Bank of New York recites are hotly disputed. Even under the plain language of the applicable constitutional provisions, statutes, and terms of the Indenture, it is not clear whether the County can be held responsible as a matter of law for failing to charge rates sufficient to pay the principal and interest on the warrants. There are two principal problems with the Bank of New York's position: (1) its claims sounding in breach of contract are barred by Alabama's one-year nonclaim statute, Ala. Code § 11-12-8, and (2) the Bank of New York has not established that it is entitled to any remedy under the Indenture as a matter of law.

On this first issue, the Bank of New York's current motion brings the County's presentment and nonclaim arguments into sharp focus. In its motion for partial summary judgment, the Bank of New York seeks relief on breach-of-contract claims even though it is undisputed that these breach-of-contract claims were not presented within a year of their accrual. There is no claim for payment on any warrant in the Bank of New York's motion – only claims for contractual remedies. The County is entitled to judgment as a matter of law on these claims, and the claims should be dismissed.

The second defect in the Bank of New York's argument is that the Indenture does not require the County to violate state law by raising rates to unreasonable levels. All of the remedies provided for in the Indenture are expressly subject to the limits imposed by applicable law.

I. THE COUNTY IS ENTITLED TO SUMMARY JUDGMENT ON THE BANK OF NEW YORK'S BREACH-OF-CONTRACT CLAIMS BECAUSE THEY ARE BARRED FOR FAILURE TO PRESENT WITHIN A YEAR.

A. The Bank of New York Was Required to Present These Claims.

The Court will recall that the County moved to dismiss the Complaint on presentment grounds, among others. Having denied that motion, the Court indicated that the intention of the Legislature when drafting Chapter 28 of Title 11 was that "somebody who issued … warrants … with the county would not have to jump through hoops to use the remedies they had under the contract." *See* Def. Evid. App., Ex. I (Transcript of February 4, 2010 Hearing), at 4. Chapter 28 of Title 11 did not replace or abrogate Ala. Code § 6-5-20, however. Since both laws remain on the books, they must be harmonized where possible. *See, e.g., Benson v. City of Birmingham*, 659 So. 2d 82, 86-87 (Ala. 1995) ("If there is a reasonable field of operation, by a just construction, for both statutes, they will be given effect") (citations and quotations omitted); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.")

Under the Court's current rulings, there is a field of operation for both laws: under Chapter 11 of Title 28, and particularly under Ala. Code § 11-28-6, a warrantholder need not go through the presentment process to be paid on a warrant;[2] any other type of claim against a

[2] In its entirety, Section 11-28-6 provides as follows:

> The issuance of warrants and any interest coupons applicable thereto, pursuant to the provisions of this chapter and in accordance with the authorization of the county commission of the county issuing such warrants, shall be deemed to constitute an audit and allowance by such county commission of a claim, in the aggregate amount of such warrants and the interest thereon, against such county and against any pledged funds pledged ***for the payment of the principal of and***

County, however, must be "presented to the county commission." ALA. CODE § 6-5-20. As the County understands the Court's rulings to this point, if this case involved a warrantholder asking the County to pay on a warrant, Ala. Code § 6-5-20 would not apply.

But that is not what this motion involves. Here, the Bank of New York repeatedly emphasizes that it is bringing a ***breach-of-contract claim***. *See* Bank of New York's Brief in Support of Motion for Partial Summary Judgment at 5-6 (laying out elements of breach-of-contract claim); Bank of New York's Motion for Summary Judgment at 11 (citing case for the proposition that the existence of default is determined by the Indenture, a contract); BNY Opp. to Intervention at 12 ("The underlying action here is a breach of contract case between the Trustee and Jefferson County, the debt issuer."). There is no doubt that breach-of-contract claims are subject to the presentment requirements just like any other claim against a County. Any other interpretation would re-write Section 6-5-20 to include an exemption for any kind of claim relating to a warrant or brought by a Trustee.

Indeed, the Alabama Supreme Court has recently reaffirmed that "all claims against a county, whether in tort or ***in contract***, must comply with the requirement of a presentment of an itemized, verified claim to the county commission." *See Wheeler v. George*, --- So. 3d ----, 2009 WL 4506591 at *20 (Ala. Dec. 4, 2009) (emphasis added). The Court continued, "[t]his failure to file the statutorily mandated claim acts as a procedural bar to ***all claims*** against the County and the County Commission." *Id.* (emphasis added).

> ***interest on such warrants*** pursuant to the provisions of this chapter. No proof of registration or other audit or allowance of such claim shall be required and such warrants and the interest thereon shall, from and after the date of their lawful issuance, be deemed to be allowed claims against the county by which they were issued and against any pledged funds so pledged therefor.

ALA, CODE § 11-28-6 (emphasis added).

Because breach-of-contract claims are subject to presentment, the Bank of New York must show either that it presented its claims in timely fashion or that its claims are excepted from presentment. It has done neither.

B. These Breach-of-Contract Claims Were Not Presented in a Timely Manner.

The Bank of New York's claims accrued no later than June 2008. *See* Complaint at ¶ 50; *see supra* note 1. It presented its claims on July 24, 2009, more than 12 months later. *See* Complaint at ¶ 119; Def. Evid. App., Townes Aff., at ¶ 9). Because the presentment came more than 12 months after the claims accrued, the claims are barred by Ala. Code § 11-12-8.

To the extent that the Bank of New York argues that Ala. Code § 6-5-280 means that each alleged Event of Default restarts the presentment clock, it is wrong. Because the Indenture contains an acceleration clause (*see* Indenture at 79, § 13.2(a)), upon the County's first alleged payment default the Bank of New York could have accelerated the debt and immediately declared all warrants due.[3] Alabama Code Section 6-5-280 has no application here because the Bank of New York could have presented the claims in the current complaint as soon as that first alleged payment default occurred. Because all of the Bank of New York's claims could have been presented – and, if denied, filed in this Court – within a year of the first alleged event of default, the late presentment in July 2009 does not save them. *Cf. McNeil v. Ritter Dental Mfg. Co.*, 104 So. 230, 231 (Ala. 1925) (stating that "the test" for determining whether a claim is barred by § 6-5-280 is "not what was actually litigated, but what might and ought to have been

[3] The *Bowdin Square* case previously cited by the Bank of New York specifically notes that there was no acceleration clause in the lease agreement at issue in that case. *See Bowdin Square, LLC v. Winn-Dixie Montgomery*, Inc., 873 So. 2d 1091, 1105 (Ala. 2003). Likewise, the *Old Southern Life* case holds that a contract is severable only if a claim for payment on the later installments had not accrued. *Old So. Life Ins. Co. v. Free*, 247 So. 2d 379, 382 (Ala. Civ. App. 1971). Contrary to the Bank of New York's citation, the *Old Southern Life* case was decided by the Alabama Court of Civil Appeals, not the Alabama Supreme Court.

litigated in the former suit"). Because all of the claims raised here could have been raised more than a year before they were presented, they are barred.

C. These Breach-of-Contract Claims Are Not Excused From Presentment.

No exception saves the Bank of New York's claims from the categorical rule that "all claims against a county, whether in tort or in contract, must comply with the requirement of a presentment of an itemized, verified claim to the county commission." *Wheeler*, 2009 WL 4506591 at *20. The only exception that is even facially plausible – the exception found in Ala. Code § 11-28-6 – clearly does not apply.

Section 11-28-6 carves out claims for "the principal of and interest on such warrants" issued under chapter 28. ALA. CODE § 11-28-6. This exception, on its face, does not apply to breach-of-contract claims brought under an Indenture. There is not a single case interpreting this statute to authorize such an expansion of its plain language.

And it is not as though the drafters of Chapter 28 were ignorant of the use of Indentures to flesh out covenants with respect to warrant issues. Another section of that Chapter, Section 11-28-3, provides that "[t]he pledge of any pledged funds for the payment of the principal of and interest on warrants issued by any county pursuant to this chapter, ***together with any covenants of such county relating to such pledge***, shall have the force of contract between such county and the holders of such warrants." ALA. CODE § 11-28-3 (emphasis added). This section's language is notably broader than the language of Section 11-28-6: the latter omits any reference to "covenants…relating to such pledge." If claims on these contractual covenants were intended to be excused from presentment, the drafters would have employed the same language in Section 11-28-6 as was used in Section 11-28-3. "When the legislature uses certain language in one part of [a] statute and different language in another, the court assumes ***different meanings were***

intended." *Trott v. Brinks, Inc.*, 972 So. 2d 81, 85 (Ala. 2007) (emphasis added) (quoting 2A NORMAN SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (6th ed. 2000)); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); *Hatcher v. Diggs*, 76 Ala. 189, 1884 WL 530 at *4 (Ala. 1884) ("It will not be intended, that the legislature used different words in the same sentence, in the same sense, and with no other or different effect. The presumption is, that the law-maker intended a difference.").

The difference between Sections 11-28-3 and 11-28-6 matters. Section 11-28-3 provides that the County's promises in the Indenture have the force of contract. As has been extensively shown (*see supra* at 6-8), contract claims are subject to presentment. Section 11-28-6 does not excuse contract claims from presentment – it only excludes claims for the payment of principal and interest. No claim for payment is present in the Bank of New York's motion for partial summary judgment. Instead, the motion for partial summary judgment is exclusively targeted at establishing breaches of contract. That kind of claim is not excused from presentment.

* * *

Because the Bank of New York did not present any of the claims that are the subject of its motion for partial summary judgment within a year of their accrual, those claims are extinguished by the nonclaim statute, Alabama Code Section 11-12-8.[4] Alabama law has been clear on this point for over a hundred years: claims that are not presented to the county

[4] "All claims against counties must be presented for allowance within 12 months after the time they accrue or become payable or the same are barred, unless it be a claim due to a minor or to a lunatic, who may present such claim within 12 months after the removal of such disability." ALA. CODE § 11-12-8.

commission within a year of their accrual are barred. *See Wheeler*, --- So. 3d ----, 2009 WL 4506591 at *20-21; *Jacks v. Madison County*, 741 So. 2d 429, 432-34 (Ala. Civ. App. 1999) (affirming the dismissal of contract, fraud, and trespass claims for failure to present within twelve months); *Chumney v. Houston County*, 632 So. 2d 1328, 1329 (Ala. 1994) (affirming dismissal of claims that were not presented within twelve months); *Health Care Auth. v. Madison County*, 601 So. 2d 459, 462 (Ala. 1992) (same); *Williams v. McMillan*, 352 So. 2d 1347, 1349 (Ala. 1977); *Marshall County v. Jackson County*, 36 Ala. 613, 615-16 (Ala. 1860) (affirming dismissal for failure to present and stating that the presentment requirement is written "in language that would seem to be incapable of being made plainer by argument or illustration" and, further, that because "the restriction upon the liability of a county to be sued, so plainly declared by the statute, is consistent with other laws relating to the same subject, and manifestly reasonable and proper, there is not the slightest occasion for departing from the literal mandate of the law").

The County is entitled to judgment as a matter of law on all of the breach-of-contract claims addressed in the Bank of New York's motion for partial summary judgment.

II. THE BANK OF NEW YORK HAS NOT SHOWN THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

In its motion for summary judgment, the Bank of New York identifies ten alleged Events of Default. It makes lists of defaults, apparently in the hopes of hiding the forest in a crowd of trees. The truth should not be missed: Events outside of the County's control caused the debt service on County's sewer debt to balloon drastically. Payment of the debt by raising marginal sewer rates became impossible. It is this failure to raise rates that is the core of this case. The long list of defaults principally flow from the fact that sewer rates do not – and, realistically,

cannot – meet the accelerated debt service payments. This case is not about repaying draws on a reserve policy or providing audited financial statements. This case is – as Judge Proctor recognized – a case about sewer rates. *See* Ex. A to Complaint at 40 (noting that "counsel for the Trustee stated unequivocally that 'receivership is meaningless until the receiver is empowered to raise revenue and cut expenses.'").

Through this lens, the issues become much clearer: the Bank of New York contends that the County should have raised rates to a level sufficient to pay debt service, no matter what. The problem with this argument is that the Indenture does not require that sewer rates rise to the level of economic suicide. At minimum, there is at least a question of fact as to whether such drastic rate increases are permissible under Alabama law, and the Indenture's rights and remedies are expressly subject to Alabama law.

The County will show the substantive Events of Default alleged by the Bank of New York are actually related to rates. Because the Bank of New York has not established that the County could raise its sewer rates to a level sufficient to pay the accelerated debt service, the Bank of New York has not established as a matter of law that it is entitled to a remedy.

A. The Bank of New York is Not Entitled to Judgment as a Matter of Law on the Alleged Rate-Based Events of Default.

Events of Default numbers one, two, three, four, five, eight, and ten all assume that the County could raise its sewer rates to a level sufficient to remedy the alleged default. Under the Indenture, the County's duty to raise rates is subject to the limits of state law. Section 13.9 of the Indenture provides as follows:

> All rights, remedies and powers provided by this Indenture may be exercised only to the extent the exercise thereof does not violate any applicable provision of law in the premises, and ***all the provisions of this Indenture are intended to be subject to all applicable mandatory provisions of law*** which may be controlling

> in the premises and to be limited to the extent necessary so that they will not render the Indenture invalid or unenforceable.

See Complaint, Ex. B, Indenture, § 13.9 at 83) (emphasis added). The Bank of New York has admitted that the Indenture does not require the County to raise sewer rates to a level that would violate state law. *See* Def. Evid. App., Ex. B, BNY Req. Admit Ans., No. 47).

The Jefferson County Commission's ability to raise sewer rates is limited by the mandatory provisions of Amendment 73 to the Alabama Constitution, which provides that the County can only charge rates that are "reasonable and nondiscriminatory." ALA. CONST. amend 73.

As a result, before the Bank of New York can establish that the County has defaulted on its obligation to raise rates under the Indenture, the Bank of New York must show that rates could be raised to the level necessary to meet the Indenture's requirements without becoming "unreasonable." Here, raising rates to a level sufficient to pay the amounts currently due would require raising rates roughly 527%, yielding monthly sewer bills to the average customer in the range of $250.00. *See* Def. Evid. App., Ex. H (Raftelis Report dated Feb. 3, 2010), at 15. The Bank of New York takes a more conservative estimate, arguing that the County need only raise its rates a mere 482% this year. *See* Bank of New York Brief at 19; Schessler Aff. at ¶ 29. To put the notion of quintupling sewer rates in perspective, the current average bill in Jefferson County is $50.32, and the highest average monthly sewer bill in the United States is $85.79. *See* Def. Evid. App., Ex. H, Raftelis Report, at 22. In order to satisfy the Bank of New York, the County would have to have sewer rates that are ***three times higher than the second-highest utility***. Needless to say, there are serious doubts as to whether such a severe rate increase could possibly be found to be "reasonable" under Alabama law. At minimum, the Bank of New York

has not shown that it is entitled to judgment as a matter of law that the County could reasonably charge such rates.

The Bank of New York has previously argued that payments sufficient to pay the cost of financing the sewer system are *per se* reasonable. That is incorrect. The cases the Bank of New York cites in support of this proposition involve a Court refusing to second guess a legislative body's determination of a rate, not about establishing some kind of mathematical floor for sewer rates. *See Mitchell v. City of Mobile*, 13 So. 2d 664, 667 (Ala. 1943) ("Rate-making is a legislative, not a judicial function. The courts cannot directly nor indirectly make rates."); *Campbell v. Water Works & Sanitary Sewer Bd.*, 115 So. 2d 519, 522-23 (Ala. 1959) (refusing to second-guess city's rate structure). While it is true that the Court in *Mitchell* found that it was permissible for Mobile to charge a rate higher than the rate that would provide for debt service payments, the Court also noted that the statute that gave Mobile the power to set rates in the first place ***required*** that the rates be sufficient for debt service. *Id.* at 666 (quoting statutory language that empowered the city "to collect such rates for waters supplied for the use of said sewerage system as shall be sufficient to pay the interest on any bonds"); *see also Campbell*, 115 So. 2d at 522 (noting that similar requirement was present in that case). There is no such requirement in Amendment 73. Moreover, unlike here, there was no evidence in *Mitchell* that the rate charged by Mobile was out-of-line with what other utilities were charging. *Mitchell*, 13 So. 2d at 667 ("No evidence was offered touching the usual rates charged in other cities under like conditions."). Mobile's power to charge rates – even its power to charge rates sufficient for debt service payments – was limited by the following language: "provided, that such rates shall not exceed the usual and customary rates charged by other cities, similarly situated, for like service." *Id.* (quoting local legislation). Instead of standing for the proposition that rates sufficient to pay

debt service are *per se* reasonable, the *Mitchell* case actually stands for the proposition that such rates are not necessarily reasonable. Moreover, the *Mitchell* case is clear that Courts may not set rates directly or indirectly. *Id.* at 667. And Judge Proctor has already found (sensibly) that a court-appointed receiver setting rates is no different than the Court itself setting rates. *See* Complaint, Ex. A at 29-31 (concluding that the appointment of a ratemaking receiver is an exercise of the injunctive power and rejecting the Bank of New York's argument that a receiver stands in the shoes of the County, not the court).

To be sure, the Bank of New York has not cited a single example of an Alabama court forcing a legislative body to raise its sewer rates (or any other utility rate, for that matter) to a level sufficient to pay debt service. If this Court takes that step, it will be going farther than any court in any reported decision of this State.

If there were any question that the reasonableness of the County's sewer rate is a hotly disputed issue of fact, the Court need look no farther than the Sixth Amended Complaint filed in the action styled *Charles Wilson et al. v. JPMorgan Chase & Co., et al.*, Civil Action No. CV-2008-901907, pending in the Circuit Court of Jefferson County, Alabama. There, the plaintiffs have demanded that this same Court find the County's current sewer rate to be unreasonably high – the exact opposite of the relief sought by the Bank of New York here. *See* Def. Evid. App. at Ex. J (*Wilson* Sixth Amended Complaint), at ¶¶ 421-27. One of the principal reasons that the County has moved to consolidate this case and the *Wilson* case is the risk of inconsistent adjudication of this very issue. *See* County's Motion to Consolidate at 6-7. Should the Court find that the Bank of New York has shown as a matter of law that the County's current rate structure is too low, it will necessarily foreclose the relief demanded by the *Wilson* plaintiffs in the Sixth Amended Complaint.

In sum, the Bank of New York has not shown as a matter of law that the County could charge a reasonable rate that meets the requirements of the Indenture's calculations. Accordingly, the Bank of New York has not established as a matter of law that the County is in default of its obligations. The question of reasonableness is a question that will have to be tried.

B. The Bank of New York Is Not Entitled to Judgment as a Matter of Law on the Alleged Reserve Fund Events of Default.

There is an additional problem with Events of Default numbers six and seven. These two Events of Default deal with the alleged failure of the County to satisfy the "Reserve Fund Requirement." What the Bank of New York fails to explain is that the "Reserve Fund Requirement" is not a hard-and-fast "requirement" at all. The Indenture does not require the County to deposit monies into the Reserve Fund unless there is money left over after the payment of debt service. *See* Indenture at § 11.3, Complaint, Ex. B at 60 (requiring that the County make payments into the Reserve Fund "from any monies remaining in the Revenue Account after there shall have been made therefrom all payments required to be made during such month into the Debt Service Fund"). There is no mandatory provision that requires the County to deposit money it does not have into the Reserve Fund. It is a "money left over" provision – it requires that the County deposit certain excess funds into the Reserve Fund only if there are excess funds after paying debt service. Here, because it is undisputed that the County does not have excess funds, the provisions relating to the Reserve Fund are not triggered.

Of course, even if there were a mandatory requirement for the County to make deposits in the Reserve Fund, the rate problem still exists. The only way the County could have sufficient funds to satisfy the Reserve Fund Requirement would be to raise rates over and beyond the 500% necessary to make debt service payments.

III. CONCLUSION

For these reasons, the County respectfully submits that the Bank of New York's motion for partial summary judgment should be denied, and that judgment as a matter of law should be entered in favor of the County. The County expresses its willingness to present oral argument on any issues briefed herein.

Respectfully submitted this 29th day of April, 2010.

s/ Joseph B. Mays, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2010, I electronically filed the foregoing with the Clerk of the Court using the AlaFile system which will send notification of such filing to the following:

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